Nos. 11743-11744

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11743.

EMPLOYERS' FIRE INSURANCE COMPANY, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD and WESTCHESTER FIRE INSURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA, CHARLES RUSCONI, as Administrator of the Estate of Tillie Rusconi, sometimes known as T. Rusconi, Mrs. Felippo Rusconi, Mrs. F. Rusconi and Mrs. Philip Rusconi, Deceased, FILIPPO RUSCONI, THELMA RUSCONI SMITH, EILLIEN RUSCONI GOODWIN and CHARLES RUSCONI,

Appellees.

No. 11744.

NEW YORK UNDERWRITERS INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, ELIZABETH HART SCOTT and HARRIET ANN SCOTT,

Appellees.

BRIEF OF APPELLANTS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

MISCELLANEOUS PAGE

STATUTES

PAGE

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BRIEF OF APPELLANTS.

Jurisdiction.

(a) *Of the district court.* This action[1] was filed in the district court by the individual plaintiffs against the appellee, United States of America, under the Federal Tort

[1]There are two actions (one by the Rusconis and one by the Scotts) and two appeals involved here and by order of this Court they have been consolidated for hearing on one set of briefs. Since the facts and law involved are practically identical in each case, they will be referred to herein, for convenience sake, in the singular, except in the few instances where it is necessary to point out any differences between the two cases. Except where otherwise indicated, the transcript references will be to the case of *Employers' Fire Insurance Co., et al. v. U. S.* (the Rusconi case), Appeal No. 11743.

Claims Act.[2] Under Sec. 931 of the Act, exclusive jurisdiction of such actions is vested in the district courts. Appellants filed motions to intervene [Tr. 10-21] under Rule 24(a) (the mandatory section), and 24(b) (the permissive section), and under Rules 17 and 19 (as a real party in interest) of the Federal Rules of Civil Procedure.

The motions were denied by the district court on the sole ground that the Act does not permit the assertion of claims or suits thereunder by subrogees [Tr. 22, 23].

(b) *Of the Circuit Court of Appeals.* Appellants have taken this appeal from the order denying their motions to intervene. Sec. 933 of the Act provides that final judgments in the district court are subject to review by appeal—

> "(1) in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts."

The order of the district court was made and entered on July 28, 1947 [Tr. 23] and the notice of appeal was filed on August 27, 1947 [Tr. 23].

The jurisdiction of this court depends on whether this order is a "final judgment" in so far as appellants are concerned. Because the answer to that question requires an examination into the allegations of the various pleadings, and in order to avoid repetition, we have felt it desirable to postpone discussion of this question of jurisdiction until after the factual situation has been set forth (see Argument, Point I, *infra*).

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[2]Chapter 753, Title IV, Public Law 601, Sec. 401 *et seq.;* 28 U. S. C. A., Sec. 921 *et seq.* (August 2, 1946), hereinafter referred to as "the Act." Except where otherwise indicated, section references will be to the U. S. Code citation.

Statement of the Case.

According to the complaints, these actions arose out of the crash of a U. S. Army Air Force P-38 airplane, while engaged in training maneuvers, at Santa Maria, California, on January 30, 1945 [Tr. 3]. As a result of the alleged negligence of the Government and the pilot, the plane crashed into a building owned by Elizabeth Hart Scott and Harriet Ann Scott [N. Y. Und. Tr. 3] and in which Tillie Rusconi and her husband Filippo Rusconi were conducting a restaurant business under the name of Rusconi's Cafe [Tr. 3].

As a result of the crash, the building was damaged, Tillie Rusconi was killed, the fixtures and stock in trade of the restaurant were destroyed, and the lease which the Rusconi's held to the premises was thereby terminated [Tr. 3-5].

Tillie Rusconi's administrator, her heirs, and Filippo Rusconi (individually and as an heir) brought this action to recover the following damages:

(a) General damages for the wrongful death of Tillie Rusconi in the sum of $25,000 [Tr. 3-4].

(b) Funeral expense in the sum of $1,362.15 [Tr. 4].

(c) Destruction of the fixtures and stock in trade of the restaurant in the sum of $33,379.02 [Tr. 4].

(d) Loss of profits in the sum of $20,440.42 [Tr. 5].

(e) Loss of goodwill and value of leasehold in the sum of $10,000 [Tr. 5].

(f) Loss of Tillie Rusconi's earnings in the sum of $30,000 [Tr. 5-6].

Likewise, the Scotts brought an action as a result of the damage to the building wherein they sought to recover the following damages:

(a) Damage and destruction of the building in the sum of $17,793.68 [N. Y. Und. Tr. 3].

(b) Loss of rents while the building was being rebuilt in the sum of $2,360 [N. Y. Und. Tr. 3].

The original complaints were filed on May 27, 1947 [Tr. 7] and on July 11, 1947, appellants filed their motions to intervene [Tr. 15]. The motions are supported by an affidavit of counsel [Tr. 16], and are accompanied by the proposed complaints in intervention as required by Rule 24(c) [Tr. 17-21].

The motion and supporting pleadings in the Rusconi case set forth that the appellants Employers' Fire Insurance Company, Automobile Insurance Company of Hartford and Westchester Fire Insurance Company are each fire insurance companies doing business in California [Tr. 18]; that prior to January 30, 1945 they had issued, respectively, certain policies of fire insurance covering the fixtures and stock contained in Rusconi's Cafe [Tr. 18]; that as a result of the airplane crash referred to in plaintiffs' complaint and the fire resulting therefrom, appellants paid the following amounts to the Rusconis, their assureds:

Employers Fire Ins. Co.	$2,500.00
Automobile Ins. Co. of Hartford	1,600.00
Westchester Fire Ins. Co.	5,000.00

that by virtue of such payments, and as provided in the policies, appellants became subrogated, *pro tanto,* to the rights of the Rusconi's against the Government [Tr. 19-20]. It was further alleged that the sum of $33,-

379.02 claimed in plaintiffs' complaint for damage to the fixtures and stock in trade is in excess of the amount agreed upon between plaintiffs and appellants as the amount of damage to such property in adjusting the loss under the policies, said amount so agreed upon being the sum of $23,403.11 [Tr. 16]; also that the complaint was filed by the Rusconi's without appellants' knowledge or consent, and that appellants desire that in the prosecution of their claims they be represented by counsel of their own choice [Tr. 16]; that appellants are entitled to intervene under Rule 24(a) because "the representation of the interest of each petitioner by plaintiffs is or may be inadequate and each petitioner is or may be bound by a judgment in this action" [Tr. 12]; and that they should be permitted to intervene under Rule 24(b) because "their claims and each of them and the main action have questions of law and fact in common * * *" [Tr. 12]; and appellants further claim to be real parties in interest and so entitled to intervene under Rules 17 and 19 [Tr. 12].

The petition and supporting pleadings in the Scott case differ only in the following respects: the moving party is appellant New York Underwriters Insurance Company, and the amounts paid by it to the Scotts were the sums of $9,623.37 for damage to the building and $1,650.00 for loss of rental income [N. Y. Und. Tr. 15]; that the sums of $17,793.68 and $2,360.00 claimed by the Scotts in their complaint for damage to the building and loss of rental income, respectively, are in excess of the amounts agreed upon between the Scotts and appellant as the amount of damage to such building and loss of rental income in adjusting the loss under appellant's policies, said amounts so agreed upon being the sum of $9,627.02 as the damage to the building and $1,860.00 for loss of rental income.

In each case the district court denied the motions to intervene on the sole and stated grounds that—

> "the Federal Tort Claims Act (28 U. S. C. §931[3]) does not expressly grant consent to suit by the subrogee of a claimant (cf. 31 U. S. C. §203), and that consent of the government to be sued, being a relinquishment of sovereign immunity, must be strictly construed (cits.)" [Tr. 22-3].

Specification of Errors.

The District Court erred:

1. In denying appellants' motions to intervene as parties plaintiff.

2. In holding that the Act does not permit suits by subrogees.

3. In holding that 31 U. S. C. Sec. 203, which prohibits assignments of claims against the United States is applicable to subrogated claims.

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[3]The pertinent portions of Sec. 931 of the Act provide:

"* * * the United States district court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

ARGUMENT.

I. The Order Is Appealable.

A. *The general rule.* In appealing from these orders denying motions to intervene, appellants are cognizant of the rule that where the denial of a petition to intervene is discretionary, it is nonappealable.

In re Dolcater (C. C. A. 2), 106 F. (2d) 30.

But it is equally well settled that there are cases—

> "where intervention is so essential to the preservation of the petitioner's rights that a denial of it is reviewable by appeal. * * * An order denying leave to intervene is * * * appealable in those cases where the petitioner can effectively assert his rights in no other action. The most common examples are where the petitioner will be bound by the judgment and is inadequately represented by other parties before the Court * * *"
>
> *In re Dolcater, supra.*

And it has been stated that the main and practical difference between absolute (Rule 24(a)) and discretionary (Rule 24(b)) rights of intervention is that in the absolute type, an appeal will lie from an order refusing intervention.

2 Moore's Fed. Practice 2332, Sec. 24.06.

In the case of *Alston Coal Co. v. Fed. Power Comm.* (C. C. A. 10), 137 F. (2d) 740, the right of appeal is recognized as follows:

> "It is a well settled principle of law that where intervention is a matter of right, an order denying the right to intervene is a final appealable order."

And this Court upheld the right of appeal from an order denying a petition to intervene in the case of *State of Washington v. U. S.* (C. C. A. 9), 87 F. (2d) 421, where it said:

> "* * * It sometimes appears that the interveners have no remedy to litigate their question, except by intervening in an existing action or suit. In such cases unless the interveners are permitted to litigate their questions in the pending litigation, their rights, whatever they may be, will be entirely lost, for they have no remedy by which such rights may be protected or adjudicated. An order denying such parties leave to intervene is, as this court stated in its first decision touching the question, a 'practical denial of all relief to the petitioner'. Therefore such an order is final and appealable."

See also to the same effect:

U. S. v. Philips (C. C. A. 8), 107 Fed. 824;

Mack v. Passaic Nat. Bank etc. et al. (C. C. A 3), 150 F. (2d) 474;

Gumbel v. Pitkin, 113 U. S. 545, 28 L. Ed. 1128;

Cathay Trust, Ltd. v. Brooks (C. C. A. 9), 193 Fed. 973.

B. *The order finally disposes of appellants' rights.* The order of the district court by its express terms is a holding that appellants have no right to assert their claims against the Government under the Act. This is no mere procedural ruling or an exercise of discretion in passing on appellants' motions but a final disposition of their right to assert their claims.

C. *If appellants may not litigate their claims in this action, their rights will be entirely lost.* It is well settled in California and generally that the rule against splitting causes of action applies to subrogated claims. In the case of *Kidd v. Hillman,* 14 Cal. App. (2d) 507, 58 P. (2d) 662, it was held that where an insured sued the tortfeasor and settled her claims before judgment, her insurance carrier could not later bring an action on its subrogated claim arising out of the same accident:

> "* * * An insured may not split his cause of action, and the insurer is in no better position than the insured. Plaintiff in her original action recovered for injuries to her person and property. She cannot now pursue appellant in another action for damage to her property arising out of the same accident * * *.
>
> It was the duty of the insurer to protect its right of subrogation, assuming it had such right. Not having done so, it cannot now be heard to complain."

And in the case of *Offer v. Superior Court,* 194 Cal. 114, 228 Pac. 11, the California Supreme Court pointed out that the proper procedure to follow where the loss is only partially covered by insurance is for both insured and insurer to join as parties plaintiff in the same action:

> "It may be suggested that to permit the insurer to sue at law in cases where the extent of the loss is not covered by the insurance policy would result in splitting a cause of action sounding in tort and thus subject the defendant to two suits upon a single cause of action. It seems, however, that this may be avoided by joining the insured as a co-plaintiff (cit) or as a

co-defendant if the insured refuses to join as a plaintiff * * *."

Since the Act (Sec. 931) subjects the Government to the same liability "to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances" "in accordance with the law of the place where the act * * * occurred", it seems clear that since California does not permit splitting of actions by subrogees, appellants will have no opportunity to assert their claims other than in this suit.

D. *Intervention is a matter of right under Rule 24 (a)*[4] *in this case.* It has already been pointed out that appellants will be bound by the judgment in this case. It likewise appears that appellants are not adequately represented by plaintiffs, in that there is a conflict in their interests, since plaintiffs claim a larger amount for the destroyed property than appellants and plaintiffs agreed upon; and because appellants had no choice in the selection of plaintiffs' counsel and desire to be represented by their own counsel.

2 Moore's Fed. Practice 2334.

In the case of *Sloan v. Appalachian Electric Power Co.* (U. S. D. C., W. Va.), 27 F. Supp. 108, it was held that an insurer claiming subrogation was entitled to intervene

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[4]Rule 24(a) provides in part: "upon timely application anyone shall be permitted to intervene, in an action * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

as a matter of right under Rule 24(a) in an action brought against the tortfeasor:

> "Rule 24(a) of the Federal Rules of Civil Procedure allows intervention as a matter of right when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; under Rule 24(b) permissive intervention is allowed when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> Under either of these rules this insurance company should be permitted to intervene here. In that manner effect can be given to the Kentucky law which allows the insurance company indemnity it pays out of any judgment which may be rendered for plaintiff. It does not appear that such intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Instead it will permit the just and speedy settlement of the entire controversy in one action."

E. *Even under Rule 24(b),*[5] *the right of appeal should be allowed in this case.* Even if it should be concluded that appellants' right to intervene falls only under Rule 24(b), since it appears from the district court's order that the Court refused to exercise its discretion either to grant or deny the motion, but placed its decision solely on a

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[5]Rule 24(b) provides in part: "upon timely action anyone may be permitted to intervene in an action * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common."

jurisdictional ground, the right of appeal should be allowed. Then if it be determined that the district court was in error, the matter should be sent back to that court so that it may properly pass on appellants' motion.

F. *Appellants were entitled to intervene under Rule 17.* The case of *Williams v. Powers* (U. S. D. C., Ohio), 2 F. R. D. 362, held that an insurance company which had paid a portion of a plaintiff's claim was entitled to be made a party plaintiff under Rule 17 in an action brought by the insured against the tortfeasor:

> "Rule 17 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c provides in part '(a) Real Party in Interest * * * Every action shall be prosecuted in the name of the real party in interest;' * * *
>
> In a case where an insurance company pays part of the damages sustained by its insured because of the tort of a third party and it claims to be subrogated to the insured's rights to the extent of such payment, both the insured and the insurance company are the real parties in interest in the suit against the party guilty of the tort.
>
> Such being the case here, both motions will be granted and the Employer's Mutual Liability Insurance Company of Wisconsin will become a new party plaintiff in the action."

Since the denial of the motion on this ground is not discretionary, an appeal should lie therefrom.

II. Under the Broad Language Used in the Act, Subrogated Claims Are Included and Petitioners Were Entitled to Intervene.

A. The Pertinent Provisions of the Act.

1. *Administrative settlement of claims.* Section 921 of the Act provides for the administrative settlement of claims which do not exceed $1,000:

> "* * * authority is conferred upon the head of each Federal Agency * * * to consider, ascertain, adjust, determine and settle *any claim* against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, *under circumstances where the United States, if a private person, would be liable* * * *, in accordance with the law of the place where the act * * * occurred." (Emphasis added.)

The claimant need not accept the award or decision of the administrative department. Under Sec. 931 of the Act, he may bring suit if he is not satisfied with the administrative decision; however, where the claim is under $1,000.00 it must first be presented to the department involved as a prerequisite to the filing of suit (Sec. 942).

2. *Suits on tort claims.* Section 931 of the Act provides that suit may be brought against the Government

in the district court on all claims whether for more or less than $1,000:

> "* * * the United States district court for the district wherein the plaintiff is resident or wherein the act * * * complained of occurred * * * shall have exclusive jurisdiction to hear, determine and render judgment *on any claim* against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment, *under circumstances where the United States, if a private person, would be liable to the claimant for such damage* * * * in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect *of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances* * * *" (Emphasis added.)

3. *Claims exempted from Act.* Sec. 943 provides that "the provisions of this chapter shall not apply to * * *" and there follow twelve categories of claims which are exempted from the scope of the Act, none of them being relevant here.

B. The Plain Meaning of the Act.

Looking only at the words used in the Act and considering the question without reference to practical construction, the history of the Act or prior administrative rulings (which will be discussed below), it is submitted that the language used is so broad that it must be deemed to include subrogated claims. The Act confers jurisdiction

on the district court to hear and render judgment "on any claim * * * under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * *"; and further that the Government shall be liable for "such claims, to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances * * *."

As said by the Attorney General (36 Op. Atty. Gen. 553) in ruling that similar language in a prior tort claims statute (31 U. S. C. A. Sec. 215), commonly referred to as the "Small Tort Claims Act"[6] included subrogation claims:

> "Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereignty, a strict construction does not permit reading into the statute something that is not there or disregarding its plain terms. The words of the statute include all claims and all claimants."

C. Under California Law, the Government Would Be Liable to Appellants if It Were a Private Individual.

The law is well settled in California that upon payment of all or a portion of an insured's loss, which loss resulted from the negligence of a third party, the insurer is thereby subrogated *pro tanto* to the insured's rights against the tortfeasor.

> "This right of the insurer against the wrongdoer does not rest upon any relation of contract or of

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[6]See Article in 35 Georgetown Law Journal 24, note 69.

privity between them, but arises out of the nature of the contract of insurance as a contract of indemnity. The right arises independent of a provision in the contract of insurance which gives the insurer the right to recover damages from the person responsible for the loss. However, it is plain that the insurer on paying the amount of the loss on the property insured is subrogated only in a corresponding amount to the insured's right of action against any other person responsible for the loss."

Offer v. Superior Court, 194 Cal. 114, 228 Pac. 11.

And the proper procedure in California where the insurer has not paid the whole loss is for both insured and insurer to join together in a single action as co-plaintiffs.

Offer v. Superior Court, supra;

Fairbanks v. S. F. Ry. Co., 115 Cal. 579, 47 Pac. 450 (a fire insurance case).

And the procedure in the federal courts in such a situation is the same:

"Under present procedure, there seems no reason why in such cases insurer and insured would not both be necessary parties and in position to sue, the one joining the other or showing, in accordance with Rule 19, why they are not joined."

6 *Cyc. of Fed. Proc.* (2nd Ed.), p. 137, Note No. 94;

Sloan v. Appalachian Electric Power Co., supra;

Williams v. Powers, supra.

III. The Legislative and Administrative History of the Act Compels the Conclusion That It Includes Subrogated Claims.

A. *Legislative history of the Act.* The doctrine of sovereign immunity in this country was inherited from the law of England where it stemmed from the principle that "The King can do no wrong." Such a doctrine worked considerable hardship on the citizenry, especially as the activities of the Government began to expand and many citizens were or felt themselves to be injured or damaged by acts of the Government. A practice developed of settling and adjusting claims against the Government by legislative action in the form of private acts, such legislation, however, not being a matter of right, but purely a matter of grace on the part of Congress.

However, this procedure proved far from satisfactory and from time to time the Congress waived the immunity of the United States to suit in respect to specified types of claims. On February 24, 1855, the Court of Claims was established (10 Stat. 612) for the chief purpose of entertaining suits on contract against the Government. By act of March 3, 1887 (24 Stat. 505 commonly referred to as the Tucker Act), concurrent jurisdiction with the Court of Claims was conferred on the district courts over contract claims and other claims "not sounding in tort", against the Government as do not involve more than $10,000. By the act of June 25, 1910 (36 Stat. 851), the Government submitted itself to suit for patent infringement.

The first departure from immunity against suits in tort was made in 1920 by the Suits in Admiralty Act (41 Stat. 525; 46 U. S. C. A. Sec. 742), by which the Gov-

ernment subjected itself to suit in the district courts in respect to admiralty and maritime torts involving merchant vessels owned or operated by the Government. This jurisdiction was later extended to include damages caused by public vessels of the United States (43 Stat. 1112; 46 U. S. C. A. Sec. 781, known as the Public Vessels Act).

Nevertheless, the exemption against suit on common law torts continued. Necessarily, in the course of its activities, countless claims of this nature arose against the Government. In order to afford some relief to the public, heads of executive agencies from time to time were vested by statute with the power to settle and adjust administratively certain types of property damage claims not exceeding a specified amount, usually $500 or $1,000. These statutes did not give the claimants any vested rights but merely conferred discretionary authority on the department heads, in some cases to pay the claims out of their appropriations, and in other cases to certify them to Congress for payment. A dissatisfied claimant had no recourse to the courts. And as to tort claims exceeding the amount of the administrative jurisdiction, the claimant's only remedy was to attempt to get a private bill through Congress. The volume of these bills presented to each session of Congress began to assume large proportions; for example in each of the 74th and 75th Congresses over 2300 private claim bills were introduced.[7]

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[7]The foregoing summary of the history of sovereign immunity in the United States is taken from the following:

Senate Report No. 1400 to the 79th Congress (2nd Session), pp. 29-31, dealing with the then proposed Act;

Commissioners etc. v. U. S. (U. S. D. C., N. Y.), 72 F. Supp. 549, 552-3.

As appears from Senate Report No. 1400 to the 79th Congress, 2nd Session, pp. 30-31, the Act was proposed to remedy the burdensome and unfair system above described and was intended to include *all* tort claims except those specifically excluded by Sec. 943 *(supra)*:

> "For many years the present system has been subjected to criticism, both as being unduly burdensome to the Congress and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right but bases any award that may be made on considerations of grace. Moreover, it does not afford a well-defined continually operating machinery for the consideration of such claims. * * *
>
> * * * As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the Government in respect to any common-law tort. The existing exemption in respect to common-law torts appears incongruous. Its only justification seems to be historical. With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles.
>
> In respect to certain classes of small claims the heads of departments are permitted by existing law to make administrative adjustment. However, in no case, is a court review now provided, if the claimant feels aggrieved at the disposition made of his claim by the head of the department. Thus by the act of December 28, 1922 (42 Stat. 1066; U. S. Code, title 31, sec. 215), the head of each department or independent establishment was authorized to adjust *any claim* for property loss or damage caused by the negli-

gence of an officer or employee of the Government acting within the scope of his employment if the amount of the claim does not exceed $1,000. It will be observed that this authority does not extend to claims for personal injuries or death. There are special statutes in existence permitting the heads of a few departments to adjust claims of a character defined in such statutes, generally not exceeding $500 in amount. For example, the Postmaster General is vested with power to settle claims not exceeding $500 involving either personal injuries or property damage caused by operations of the Post Office Department.

The present bill would establish a uniform system authorizing the administrative settlement of small tort claims and permitting suit to be brought *on any tort claim * * * with the exception of certain classes of torts expressly exempted from the operation of the act.*" (Emphasis added.)

As a corollary to the administrative settlement and suit provisions of the Act and in furtherance of the purpose of eliminating the burden on Congress of entertaining private claim bills, Sec. 424(a)[8] of the Act provides:

"All provisions of law authorizing any Federal agency to consider, ascertain, adjust or determine claims on account of damage to * * * property * * * caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his * * * employment are hereby repealed in respect of claims cognizable under Part 2 of this title * * *."

and Sec. 131 of the Act[8] provides that:

"no private bill * * * authorizing or directing (1) the payment of money for property damages

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[8]The reference is to Public Law 601 (The Act), as this section has not been codified.

> * * * for which suit may be instituted under the * * * Act, * * * shall be received or considered in either the Senate or the House of Representatives."

B. *For many years subrogated claims have been treated identically with other tort claims by administrative departments and the Congress.*

On December 28, 1922, Congress passed what is referred to as the Small Tort Claims Act (42 Stat. 1066; 31 U. S. C. A. Sec. 215). That statute, so far as material, provides:

> "The head of each department * * * may consider, ascertain, adjust, and determine *any claim* * * * on account of damages to * * * privately owned property * * * caused by the negligence of any * * * employee of the government acting within the scope of his employment. Such amount as may be found to be due *to any claimant* shall be certified to Congress as a legal claim * * *"[9] (Emphasis added.)

On June 29, 1932, the Attorney General had occasion to consider at length whether this language included subrogated claims (36 Op. Atty. Gen. 553, *supra*). He pointed out that the language used was so broad it must be held to include subrogated claims; that had the Government been a private individual, it would clearly have been liable to respond to the insurer's subrogated claim; and he then stated:

> "Bearing these principles in mind, it seems entirely clear that upon payment of the damage by an insur-

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[9]It should be noted that the quoted language is substantially identical with that used in the Act.

ance company, and proof of this fact, you would upon plain principles of law be required to recognize the insurance company as the claimant to whom the amount of the adjusted claim is due, within the meaning of the statute."

He then went on to discuss the legislative history of the 1922 Act stating:

"Nothing in the legislative history of the Act of December 28, 1922, indicates that Congress intended to bar insurance companies from securing relief under the statute. The various committee reports do not discuss any phase of the problem. * * * there is no suggestion that the broad terms of the Act were not intended to grant relief to claimants who under insurance contracts might become subrogated to the rights of the owners."

He then went on to note that the practices of the various executive departments under the 1922 Act were not consistent, the Post Office, Navy and Labor Departments consistently certifying subrogated claims to Congress, and the War, Interior and Agricultural Departments and the Veterans Administration taking a contrary position apparently as the result of a ruling by the Comptroller General (6 Comp. Gen. 770) wherein he construed a prior act (41 Stat. 131) as not including subrogated claims. The Attorney General then pointed out that whenever department heads had certified subrogated claims to it, Congress had uniformly appropriated the money to pay them. He concluded:

"As the ultimate question is the intention of Congress, this practical construction by the legislative body is impressive. Our objective being to ascertain the purpose of Congress in the enactment of this

statute, and since no claim may be paid under the statute until it has been certified to Congress and an appropriation made for that purpose, a ready means is afforded of obtaining a final and conclusive legislative construction. By refusing certification we might obtain ultimately a judicial determination of the question through a mandamus suit brought by some claimant to compel certification of his claim, but that would involve expense and delay, and the sensible course is to have the question cleared up by legislation or by legislative action amounting to a conclusive legislative construction.

For these reasons I believe the practical course is to resolve any doubts by construing the statute to require certification, thus giving the Congress an opportunity to consider and decide whether it intended by this statute that such claims should be paid. In making the certification special attention should be called to the fact that it is a subrogation claim by an insurer and the attention of Congress should be drawn to the point involved so that it may receive deliberate consideration."

That department heads thereafter uniformly certified subrogated claims to Congress which in turn appropriated moneys to pay them appears from a letter dated, October 6, 1939, from the Federal Works Administrator to the Comptroller General, reproduced in 19 Comp. Gen. 503, 504:

"* * * The Act of December 28, 1922 (42 Stat. 1066; U. S. C. 31, sec. 215), confers authority upon the heads of governmental agencies to consider and determine claims of a similar nature for certification, if favorably determined, to Congress for appropriation for payment. The Attorney General of the United States, on June 29, 1932, rendered an

opinion, vol. 36, page 553, to the effect that subrogation claims of insurance companies could be considered under that act and certified to the Congress in order that it might determine whether the act covered such claims by making appropriations for their payment. *Since that time, it appears that the Congress has consistently appropriated, usually in the deficiency bills, sums to pay for claims of subrogees, thereby evidencing that they are properly for consideration under the act cited.*" (Emphasis added.)

In that letter, the Federal Works Administrator asked the Comptroller General for his opinion as to whether Sec. 26 of the Emergency Relief Appropriation Act of 1939 (53 Stat. 936) included subrogated claims. That act authorized the Administrator to:

> "consider, ascertain, adjust, determine and pay * * * *any claim* * * * on account of damage to * * * property * * * caused by the negligence of any employee of the * * * National Youth Administration * * * while acting within the scope of his employment."

The Comptroller General pointed out the similarity of the quoted statute and the 1922 Small Tort Claims Act passed on by the Attorney General (36 Op. Atty. Gen. 553, *supra*). He refused to follow the earlier contrary opinion of the Comptroller General (6 Comp. Gen. 770, *supra*) and held that the statute in question included subrogated claims, stating:

> "* * * There is nothing either in section 26 or in section 20 specifically providing for the payment of subrogation claims, and the legislative history of said section 20 fails to shed any light upon that particular phase of the matter. However, the explana-

tion quoted above with reference to section 20 would appear to indicate that what was intended was the prompt payment of the claims in question under funds appropriated for relief purposes rather than requiring that such claims be reported to the Congress for appropriation under the 1922 act, when the claims are not in excess of $500.

It is well settled that in the absence of a specific statutory provision the Government is not liable for loss or damages resulting from the negligent acts of its officers and employees. German Bank v. United States, 148 U. S. 573, 579. However, the apparent purpose of section 26 of the Emergency Relief Appropriation Act of 1939 and of section 20 in the prior act was, among other things, to partially remove or surrender this immunity from liability so as to permit payment from funds provided by said act of 'any claim' of $500 or less arising out of the operations thereunder and involving damage to or loss of privately owned property caused by negligence of Work Projects Administration employees while acting within the scope of their employment.

The law is well settled that an insurance company which pays valid claims for loss or damage to privately owned property pursuant to the requirements of an insurance contract with the injured party is entitled to be subrogated to the rights of the insured against the person legally responsible for the loss. (Cit.) *There is nothing in the language of the provision of law here in question nor in the legislative history thereof to indicate an intention that this rule of subrogation should not apply with respect to claims filed under said provision. On the contrary, the use of the broad and comprehensive term 'any claim' would appear to cover all claims of the type described when filed by any person to whom the*

United States would have been liable prior to the enactment of the statute but for its sovereign immunity.

As noted in your letter, the Congress has sanctioned the payment of claims of insurance companies under the act of 1922, and it is to be noted, also, that in at least one instance where the Congress contemplated the exclusion of certain insurance companies from the terms of a relief statute it specifically so provided. See the act of August 27, 1935, 49 Stat. 2194, for the relief of certain claimants who suffered loss by fire in the State of Minnesota during October, 1918, in which it was provided that 'notwithstanding the terms and conditions of any policy of insurance, or the provisions of any law, no fire-insurance company, except farmers' mutual fire-insurance companies, shall have any rights in and to funds appropriated, the payments herein provided for, nor to any right of subrogation whatsoever.'" (Emphasis added.)

A similar question was similarly answered by the Comptroller General on October 17, 1941, in a decision furnished the Postmaster General (21 Comp. Gen. 341) wherein he ruled that the Act of June 22, 1934 (48 Stat. 1207; 5 U. S. C. A., Sec. 392), conferring authority on the Postmaster General to settle *"any claim"* for damage to person or property not exceeding $500 included subrogated claims. He held:

"* * * the use of the broad and comprehensive term *'any claim'* in the act here involved would appear to cover all claims of the class described in the act when filed by any person to whom the United States would have been liable prior to the enactment of the act but for its sovereign immunity." (Emphasis added.)

C. *The enactment of the Act, in light of the foregoing history, indicates an unmistakable intent by Congress to include subrogated claims.*

It is submitted that:

(a) The many years of both administrative and legislative practice in construing the words *"any claim"* and the like in practically identical statutes, to include subrogated claims,

(b) The opinions of the Attorney General and the Comptroller General to the same effect,

(c) The purpose of the Act in eliminating the burden on Congress of dealing with tort claims by private bills, and in giving the right to seek relief in the courts to *all* such claimants,

(d) The failure of the Congressional Committees considering the Act to give any indication that they intended to exclude subrogated claims from the scope thereof, and the failure to so provide in the Act, although certain types of claims were specifically excluded,[10]

(e) The lack of any logical reason to exclude subrogated claims from the scope of the Act and thus leave such claimants only the remedy of congressional action, which the Act sought to eliminate, and

(f) The intentional inclusion in the Act of very broad language which was almost identical with the language used in the Small Tort Claims Act and other administrative acts, and which had been for many years construed to include subrogated claims,

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[10]Section 943 of the Act quoted *supra* under Point II-A-(3).

compel the conclusion that Congress intended to include subrogation claims within the scope of the Act.

It is well settled that administrative and legislative construction of a statute should be given great weight in determining the meaning of a statute—

> "Possible doubts as to the proper construction of the language used should be resolved in the light of its administrative and legislative history. * * * The provision has been consistently enforced as construed, was reenacted by Congress in the 1921 Act, and remained on the statute books without amendment until its repeal. Such a construction of a doubtful or ambiguous statute by officials charged with its administration will not be judicially disturbed except for reasons of weight, which this record does not present. (Cits.) The reenactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed."
>
> *McCaugh v. Hershey Chocolate Co.,* 283 U. S. 488, 492, 75 L. Ed. 1183.

And reenactment by Congress of a statute without material change is deemed to be a legislative approval of previous administrative interpretation—

> "The reenactment of the pertinent provisions of sec. 202 of the Revenue Act of 1921 in the Acts of 1924 and 1926, without material change, was a congressional recognition and approval of the interpretation of the section by the treasury regulations which gave them the force of law."
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> *Hartley v. Comm. of Internal Revenue,* 295 U. S. 216, 220, 79 L. Ed. 1399.

and this rule would seem even more appropriate where, as here, the previous interpretation had been shared in by the Congress itself for many years by its action in appropriating money to pay subrogated claims which had been certified to it for payment by administrative departments under similar statutes.

IV. 31 U. S. C. A., Sec. 203 (the Prohibition Against Assignment of Claims Against the United States), Is Inapplicable to Subrogated Claims.

This section provides that—

> "All transfers and assignments made of any claim upon the United States * * * shall be absolutely null and void * * *."

It has uniformly been held that the provisions of this section have no application to an assignment by operation of law.

> "The object of this section (31 U. S. C. A., Sec. 203) is to protect the government, and does not embrace cases where there has been a transfer of title by operation of law."
>
> *Western Pac. R. R. Co. v. U. S.*, 268 U. S. 271, 69 L. Ed. 951.

The claims of appellants arose by operation of law upon payment of the losses, under California law.

> "This right of the insurer against the wrongdoer does not rest upon any relation of contract or of privity between them, but arises out of the nature of the contract of insurance as a contract of indemnity. The right arises independent of a provision in the contract of insurance * * *."
>
> *Offer v. Superior Court, supra.*

And it was held in the case of *Morgenthau v. Fidelity & Deposit Co.* (Ct. of App., D. C.), 94 F. (2d) 632, 636, that Sec. 203 was inapplicable to a subrogated claim of an insurer since the prohibition does not apply to assignments by operation of law—

> "The government contends * * * that the surety has no valid claim on the fund involved because under R. S. §3477, as amended, 31 U. S. C. A. §203, the assignment was void. So far as a legal assignment is concerned much may be said in favor of this contention, but we do not have to pass on this point because R. S. §3477 has never been construed to apply to assignments by operation of law."

And in the case of *American Tobacco Co. v. U. S.*, 32 Ct. Cl. 207,[11] the Court of Claims considered the same question at length and concluded that R. S., Sec. 3477 (31 U. S. C. A., Sec. 203), had no application to subrogated claims against the Government. In that case it appeared that internal revenue stamps of the value of some $4100 belonging to American Tobacco Co. were destroyed by fire. Certain fire insurance companies paid this sum to the American Tobacco Co. and this suit was then brought against the Government for the use of the insurance companies to recover back the loss so paid. The action was brought under Sec. 3426 of the Revised Statutes which provided that:

> "The Commissioner of Internal Revenue may * * * make allowance for or redeem such of the stamps issued under the provisions of this title * * * as may have been spoiled, destroyed or rendered useless

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[11]Affirmed by the Supreme Court in 166 U. S. 468, 41 L. Ed. 1081.

* * *; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof * * *."[12]

The Court of Claims rendered judgment for the claimant (the insurers suing in the name of the insured) and disposed of the non-assignability section as follows:

"* * * The statute which prohibits assignments by the voluntary acts of the parties did not intend by its operation to destroy or limit the equitable doctrine of subrogation, which the common law has recognized and enforced from time immemorial, and which has been most effectual in preserving just rights to parties litigant. It was held in the case of Erwin v. The United States (97 U. S. 392) that 'the act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States,' which was the subject of consideration in the Gillis case, 'applies only to the voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. * * *' (P. 223.)

* * * In the passage of the act of 1853, and its subsequent enactment in the Revised Statutes (sec. 3477), Congress did not intend (by the prohibition of the assignment of choses in action pertaining to the Government) to destroy and abrogate the rights of subrogation, which had been recognized by courts of law and courts of equity administering the common law, in connection with the doctrine that upon the grounds of public policy choses in action could not be

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[12]Compare the restrictive language here used in specifically referring to the "owner" with the very broad language used in the Act.

assigned so as to change the legal obligations and rights from the assignor to the assignee.

The purpose of the law of 1853 was to confine the obligations of the Government to the party or parties with whom it had contracted, to secure the personal service in the performance of the contract, and more especially to prevent the complications and troubles which might arise in the adjustment of the rights of parties because of the transfer of the contracts and obligations of the Government. No complication or trouble as to these rights can arise out of the subrogation of the rights of the parties.

The obligations and responsibilities of the original parties are to be determined upon the same basis as if no subrogation had intervened." (P. 226.)

V. Under the Analogous Suits in Admiralty Act, Suits by Subrogees Have Been Permitted.

The Suits in Admiralty Act (46 U. S. C. A., Sec. 741 *et seq.*) is a consent by the Government to be sued for maritime torts occasioned by merchant vessels owned or operated by it. Sec. 742 of that Act provides:

"In cases where if such vessel were privately owned or operated, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States * * *."

and by Sec. 743 it is provided:

"Such suits shall proceed and shall be heard and determined according to the principles of law * * * obtaining in like cases between private parties. * * *"

The analogy between that Act and the Federal Tort Claims Act is readily apparent and has been pointed out in the case of *Englehardt v. U. S.* (U. S. D. C., Md.), 69 Fed. Supp. 451, 453.

In the case of *United States Fid. & Guaranty Co. v. U. S.* (U. S. D. C., N. Y.), 56 F. Supp. 452,[13] the libelant was the compensation insurance carrier for the employer of one Walsh who was injured while working as a longshoreman on a vessel owned and operated by the Government. Walsh applied for and received compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 901, and the carrier then brought this action on behalf of itself and Walsh to recover for Walsh's injuries. The Government excepted to the libel on the ground—

> "that the claim of libelant as subrogee or assignee is not one in connection with which the United States has consented to be sued under the Suits in Admiralty Act of 1920 * * *."

The District Court overruled the exception stating:

> "There is no doubt that were this suit between private parties, it could be maintained in admiralty either by the libelant or the employer of Walsh (cits). A libel *in personam* may be brought against the United States in cases where a proceeding in admiralty could be maintained if the vessel were a merchant ship and privately owned. * * * 46 U. S. C. A. § 742, 743. Under the Longshoremen's Compensation Act, 33 U. S. C. A. §901 to 950, the insurance carrier which has assumed payment of the

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[13]The same case on a later appeal from a decree in favor of the libelant is reported in 152 F. (2d) 46.

compensation, is subrogated to all of the rights of the employer * * * and the employer has by the same act the right to sue to recover the damages (cit). In my judgment, the recovery here sought is the same which the employee himself might seek, and would be within the jurisdiction asserted. That it is brought in the name of someone else, who, by federal law, is given the right to sue, does not and should not change the jurisdiction status."

Another case where suit by a subrogee was permitted under the Suits in Admiralty Act is *Phoenix Ins. Co. v. U. S.* (U. S. D. C., Conn.), 3 F. Supp. 112. There it appeared that a shipment of iron rods on a vessel owned and operated by the Government was damaged en-route to Japan. In 1926, the consignee brought action in the district court against the U. S. Shipping Board to recover his damages, but the action was dismissed in May 1932, because not commenced within the time prescribed in the Suits in Admiralty Act. In 1932 the Suits in Admiralty Act was amended to extend the period of limitations to December 31, 1932 on any suit "based on a cause of action" whereon a prior suit had been commenced prior to January 6, 1930, and had been dismissed because of limitations. Libelant was the insurance carrier for the consignee and had paid the consignee a loss of $5,784.41, which it sought to recover in the present action. The Government excepted on the ground that the "cause of action" here sued on was not the same "cause of action" as that of the libel previously brought by the consignee.

The district court overruled the exception stating:

"I can find no merit in the respondent's contention that the 'cause of action' set forth in this libel is not

the same cause of action as that of the libel brought * * * by the Japanese consignee. * * *

Nor is the identity of that cause of action changed by the subrogation of the insurer, the libelant herein, to the rights of the assured, who was the original libelant. The cause of action in both cases is the combination of the same primary right and its violation. The subrogation results only from a change in the beneficial ownership of the cause of action, and affects the underlying cause not at all (cits.).

If Congress had intended to limit the application of the amendment to the then owners of existing causes of action, it could easily have found language adapted to that purpose. Its failure to do so is significant. Moreover, the intent of Congress to relieve hardship requires the application of the amendment as well to the subrogee as to the libelant. * * *"

Another case of interest is *Defense Supplies Corp. v. U. S. Lines Co.* (C. C. A. 2), 148 F. (2d) 311.[14] That was an action brought under the Suits in Admiralty Act by Defense Supplies Corp., a government corporation, on behalf of its insurance carriers which had reimbursed it for damage to a wool shipment alleged to have been caused on a Government vessel. The Government excepted to the libel on the ground that the Defense Supplies Corp. could not maintain a suit against the United States. The district court dismissed the libel and that decision was affirmed on appeal, the circuit court stating:

"* * * The threshold question is whether the Defense Supplies Corporation may bring suit against the United States under the Suits in Admiralty Act.

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[14]This is one of the two cases cited in the District Court's order. The other will be discussed *infra,* under Point V.

We recognize the fact that the real parties in interest are the insurance companies. But their right to sue is dependent upon the right of the party to whom they are subrogated.

In interpreting the [Suits in Admiralty] act, permitting as it does a suit to be brought against the United States, we must follow the rule of strict construction. This follows from the fact that the United States cannot be sued without their consent, and, if Congress in certain cases gives its consent, the courts are confined to the letter of the statute which express such consent (cit.).

It seems clear to us that the complete ownership of the Defense Supplies Corporation by the United States shows this to be nothing more than an action by the United States against the United States. The Act would appear to contemplate no such action. Sections 1 and 2 indicate that the United States shall be the defendant. And Section 3 states that such suits as are brought under the Act shall proceed according to the principles of law and rules of practice obtaining in like cases between private parties. In private litigation the plaintiff and defendant cannot be the same. For, in that event, there is no real case or controversy. We conclude, therefore, that the Defense Supplies Corporation cannot maintain a suit against the United States under the Suits in Admiralty Act."

It seems implicit from the Court's opinion that had the insured been other than the Government, the action, although on a subrogated claim, would have been sustained, on the ground that such a suit would have been maintainable between private parties. It is submitted that the case is in no wise inconsistent with appellants' position herein, but on the contrary supports it.

VI. The Rule of Strict Construction Is Inapplicable.

The district court based its order on the ground that since the Act does not expressly mention subrogees, it must be construed to exclude them under the rule of strict construction applicable to a statute relinquishing immunity of the sovereign to be sued, citing *United States v. Sherwood,* 312 U. S. 584 and *Defense Supplies Corp. v. U. S. Lines Co.,* 148 F. (2d) 311.[15]

The *Sherwood* case dealt with the purely procedural question of whether under the Tucker Act (28 U. S. C. 41 (20)), a suit could be maintained in the district court against the United States and another defendant jointly. The Supreme Court concluded that it could not, citing the rule of strict construction.

In the recent case of *Englehardt v. U. S.* (U. S. D. C., Md.), 69 F. Supp. 451, *supra,* the Court held that under the Act, a joint tortfeasor could be joined as a co-defendant with the Government. The court considered the holding in the *Sherwood* case, *supra,* but concluded that its reasoning and conclusion and the Tucker Act itself, were inapplicable to a construction of the Act. On the contrary, the court felt that the Act was analogous to the Suits in Admiralty Act,—

> "* * * I conclude after careful consideration of the Sherwood case that its reasoning is not applicable to suits under the recent Federal Tort Claims Act which has a very different history and was intended to apply to quite different situations * * *.

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[15]The *Defense Supplies Corp.* case has already been discussed under Point V, *supra.*

> The jurisdiction conferred in the Federal Tort Claims Act is more similar or analogous to that conferred by the Suits in Admiralty Act (cit.) than the jurisdiction under the Tucker Act. * * *
>
> The language used in the Tort Claims Act as well as the subject matter dealt with, is strikingly similar in effect. Both Acts clearly indicate that it was the intention of Congress to waive its sovereign immunity from suit; and to permit the maintenance in the district court of suits against the United States in cases where there would be liability on individuals in like circumstances * * *."

And the Supreme Court and this Court have squarely held that the Suits in Admiralty Act and its counterpart the Public Vessels Act are *not* to be construed strictly.

> "While the general history of the Act (Public Vessels Act[16]) does not establish that the statute necessarily extends to the non-collision cases in view of the rule of strict construction of statutory waiver of sovereign immunity (cits.), we think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation.
>
> * * * we hold that the Public Vessels Act was intended to impose on the United States the same liability * * * as is imposed by the Admiralty law on a private shipowner * * *."
>
> *Canadian Aviator, Ltd. v. U. S.,* 324 U. S. 215, 222, 228, 89 L. Ed. 901.

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[16]46 U. S. C. A. 781, *et seq.* Sec. 782 of the Public Vessels Act provides that suits thereunder "shall be subject to and proceed in accordance with the provisions of Chapter 20 (the Suits in Admiralty Act)."

"The Canadian Aviator case considers the Public Vessels Act in the light of the Suits in Admiralty Act and prior pending bills and concludes that it is not to be construed strictly as in other statutes creating the sovereign's permission to be sued."

O. F. Nelson & Co. v. U. S. (C. C. A., 9), 149 F. (2d) 692, 699.

It is submitted that considering the history of the Federal Tort Claims Act, the purposes for which it was passed, and the broad language used, it should not be subjected to a stricter rule of construction than the closely analogous Suits in Admiralty Act.

In any event, the rule of strict construction has no application where the language of a statute is clear and unambiguous; and such rule should not be used as a means of emasculating the clearly expressed intention of the Congress.

"Statements appear and reappear in the decisions to the effect that the rules of strict or liberal interpretation have no application where the language of the statute is clear."

3 *Sutherland Stat. Const.* (3rd Ed.), 40.

" 'Construing a statute strictly means under the authorities simply that it should be confined to such subjects or applications as are obviously within its terms or purposes * * *. In recent years the rule of strict construction has lost much of its force, as it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully its plain and rational meaning, and to promote its object.' "

Lawton v. Sweitzer (Ill.), 188 N. E. 811.

And as was said by the Attorney General (36 Op. Atty. Gen. 553, *supra*), in ruling that the Small Tort Claims Act included subrogation claims:

> "Assuming that such a statute is to be strictly construed because in derogation of the immunity of the sovereignty, a strict construction does not permit reading into the statute something that is not there or disregarding its plain terms. The words of the statute include *all claims* and *all claimants.*" (Emphasis added.)

It is respectfully submitted that the orders should be reversed with directions to permit the filing of the complaints in intervention.

Dated: Los Angeles, California, December 16, 1947.

Respectfully submitted,

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